

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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DEC - 4 2001

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations)

(Au Gres, Michigan))

MM Docket No. 01-115 /

RM-10129

RM-10325

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

MOTION TO STRIKE

Fort Bend Broadcasting Company ("Fort Bend"), by its counsel, hereby moves to strike the "Reply Comments of Northern Radio of Michigan, Inc." and the "Reply Comments of WATZ Radio, Inc. In Opposition to Counterproposal," both filed in the above-captioned proceeding on November 7, 2001. The deadline for filing reply comments in this proceeding was October 22, 2001, and those reply comments should be stricken as untimely. In support whereof, Fort Bend states as follows:

1. On October 5, 2001, the Commission issued a Public Notice, Report No. 2506, announcing the receipt of Fort Bend's counterproposal in this proceeding (copy attached as Exhibit A).¹ The public notice set a deadline of fifteen days from its issuance for the filing of reply comments. Since the date that is fifteen days after October 5, 2001 fell on a Saturday,

¹ The counterproposal was filed jointly with Crystal Clear Communications, Inc., then the licensee of WBNZ(FM), Frankfort, Michigan. As discussed in Fort Bend's reply comments (filed October 22, 2001), Fort Bend subsequently closed on its purchase of WBNZ from the former licensee.

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reply comments were to have been filed with the Commission by October 22, 2001. *See* 47 C.F.R. § 1.4(j). No reply comments other than Fort Bend's were filed by that date.

2. One day after the reply comment deadline, on October 23, 2001, the Commission issued a Public Notice, Report No. 2506 (correction). This "correction" contained a second notice of the receipt of Fort Bend's counterproposal, identical to the first notice in every respect except for the assignment of a new RM number, and the specification of a new filing date for reply comments (copy attached as Exhibit B). Northern Radio of Michigan, Inc. ("Northern") and WATZ Radio, Inc. ("WATZ") filed reply comments on November 7, the date set forth in the second public notice. However, under well-settled law, the second public notice is without any legal effect.

I. The Reply Comments of Northern and WATZ are Untimely and Should be Stricken from the Record.

3. When the Commission issues duplicative public notices, the first public notice establishes the filing deadline and the second public notice is without legal effect. Pleadings not filed by the first filing deadline are untimely. For example, when the Commission issued a public notice on December 6, 1989 announcing the filing of an application for a new noncommercial educational station and establishing a cut-off date of January 10, 1990 for the filing of mutually exclusive applications, a second public notice of the same application setting forth a deadline of February 1, 1990 was without effect. *State of Oregon Acting by and Through The State Board of Higher Education*, 8 FCC Rcd 3558 (1993), *aff'd*, 11 FCC Rcd 1943 (1996). Similarly, a public notice issued on October 12, 1984 establishing a cut-off deadline of November 14, 1984 was not overridden by a subsequent public notice issued two years later. *Florida Institute of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992). *See also Application of Ameritech*, 15 FCC Rcd 18824 (second public notice of transfer application was without effect).

4. In this case, the public notice was apparently reissued in order to assign a new RM number to the counterproposal, and was listed as “corrected.” However, the lack of an RM number does not change the substance of the public notice. Parties were on notice that a counterproposal had been filed, and the notice correctly identified all the communities involved. Any party wishing to reply had all the information necessary to prepare and file its reply. Thus, even in the case of a corrected public notice, the first notice establishes the filing deadline. *Crystal Broadcast Partners*, 11 FCC Rcd 4680 (1996).

5. Since the first public notice of the filing of Fort Bend’s counterproposal established a date of October 22, 2001 for the filing of reply comments, and the second public notice was without legal effect, the reply comments filed by Northern and WATZ on November 7, 2001 were untimely, and must be stricken from the record of this proceeding.

II. Even if Considered, the Procedural Arguments Raised by WATZ are Meritless.

6. WATZ, in its reply comments, alleges that Fort Bend is engaged in a “scheme” or “subterfuge” to foreclose other counterproposals. It infers that this alleged scheme must exist because (i) Fort Bend advanced its rule making proposal as a counterproposal rather than as an initial petition, and (ii) Fort Bend used a different law firm in another proceeding. *See* Reply Comments of WATZ at 4-5. Even if the Commission were to consider WATZ’s argument (which it should not, for the reasons discussed above), this logic is hardly compelling. The Commission’s rules are explicitly designed to permit the filing of counterproposals in comments rather than as initial petitions. *See* Section 1.420 of the Commission’s Rules, 47 C.F.R. § 1.420. This procedure has been repeatedly upheld as consistent with the Administrative Procedure Act. *See Southampton, New York, et al.*, 10 FCC Rcd 11516 (1995); *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990), and cases cited therein. If WATZ had a plan of its own that is now

precluded, it could have filed its proposal at any time. Waiting to file risks the filing of a mutually exclusive proposal with cut-off protection.²

7. Moreover, many broadcasters (as well as other parties before the Commission) use more than one law firm, and communications lawyers often have conflicts of interest that *require* the referral of certain matters to other lawyers. In this case, the firm of Smithwick & Belendiuk already represented the petitioner. Fort Bend turned to undersigned counsel to represent it in this proceeding. Any allegation of wrongdoing by WATZ on these facts is pure speculation and conjecture.

8. WATZ also states that Fort Bend's counterproposal is not a valid counterproposal. *See* Reply Comments of WATZ at 6-8. This argument is meritless. "A counterproposal is a proposal for an alternative and mutually exclusive allotment *or set of allotments* in the context of the proceeding in which the proposal is made." *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990) (emphasis added). Fort Bend's proposal is mutually exclusive with the initial petition in this proceeding because Channel 295A cannot be used at both Au Gres and Standish. It is not necessary that each and every allotment in a counterproposal be mutually exclusive with the petition, as WATZ seems to suggest. *See, e.g., McCook, Nebraska, et al.*, 66 FR 26806 (2001) (granting counterproposal involving five allotment changes in which only the fifth conflicted with petition).

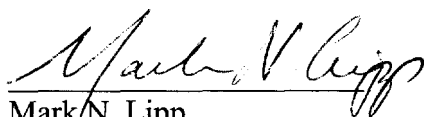
² Although WATZ complains that it has "unfairly" been deprived of the opportunity to file its own competing proposal, this "unfairness" accompanies any first come-first served process. WATZ could have filed a competing proposal at any time, but having waited until Fort Bend filed first, it cannot complain that the process is "unfair." *See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4745 (1993) (the risk that a counterproposal could be precluded by a conflicting application can be minimized by filing at the earliest possible time).

III. Fort Bend is Diligently Working To Examine the Terrain in the Direction of Frankfort and, if Necessary, Propose a Solution to Overcome any Obstacle.

9. Both WATZ and Northern allege that a terrain obstacle prevents a 70 dBu signal from reaching all of Frankfort, Michigan from the allocation reference coordinates of Fort Bend's proposed allotment of Channel 257C1 at Frankfort. Although these comments must be stricken from the record for the reasons given above, Fort Bend is undertaking an examination of the terrain in the Frankfort area with regard to compliance with Section 73.315 (the community coverage rule). Fort Bend only recently learned of this potential problem, and will diligently pursue any alternatives that may be necessary. Thus, Fort Bend requests that it be given additional time as necessary to prepare an amendment.

Respectfully submitted,

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December 4, 2001

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 4th day of December, 2001, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Motion to Strike**" to the following:

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